See also
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No. 15,768

IN THE

United States Court of Appeals

For the Ninth Circuit

LAU AH YEW,
Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Civil No. 1254.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF FACTS AND LAW DISCLOSING JURISDICTION.

Appellee agrees with the jurisdictional statement of Appellant as far as it goes, however, the following is added:

The Fourth Amended Complaint was filed on November 14, 1956 (R. 2-4). An Answer was filed by the Appellee on November 16, 1956 (R. 5-6). Jurisdiction of the District Court is based upon Section 503 of the Nationality Act of 1940; 54 Stat. 1171, et seq., 8 U.S.C. former Section 903. Judgment was entered in favor of the Appellee on June 28, 1957 (R. 20), and Notice of Appeal was dated July 23, 1957 (R. 21)

and filed July 24, 1957 (R. 23). Jurisdiction of this Court is based on 28 U.S.C. Sections 1291 and 1294(a).

STATEMENT OF FACTS.

Appellee does not agree with Appellant's statement of the facts and, consequently, presents his own statement of facts. Appellant claims that he was born in Honolulu on February 1, 1898 (R. 42). Appellant also claims that he was taken to China by his father about a year after his birth (R. 49), and states also that soon after his arrival in China his father died (R. 49). In 1915 the person who the Appellant claims to be was admitted to the United States on primary inspection (R. 43, Defendant's Exhibit E, R. 107, 109). At that time three witnesses appeared and testified on behalf of this person who Appellant claims to be (R. 43, 65-66, Plaintiff's Exhibit 1). Appellant claims that he applied for a Certificate of Citizenship—Hawaiian Islands, at the Immigration and Naturalization Service in Honolulu, T. H., and that this Certificate was refused (R. 44, 45). He also claims that he applied for a U.S. passport to China in 1947, which was refused. Appellant claims to have "applied for a passport to return to the United States in Hong Kong" (R. 46-47). The Trial Court found that the evidence presented by the Appellant is not worthy of belief (R. 17), and further found there was no evidence worthy of belief that substantiates the identity of the Appellant as the person admitted to the United States in 1915 (R. 18).

The Court found also that the person admitted in 1915 is an imposter (R. 18).

The Court found further that the Appellant upon material points could not tie his story in with the substantiating witnesses in the 1915 hearing (R. 18, 19).

STATUTES INVOLVED.

Section 503, Immigration and Nationality Act

§903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. . . .

QUESTIONS PRESENTED ON APPEAL.

The Appellant has presented three questions of fact on appeal and one mixed question of law and fact.

The question of law presented concerns whether the Appellant or the Appellee had the burden of going

forward with the evidence and also concerns the quantum of evidence required of the Appellee in this type of case.

The questions of fact presented attack particular findings of the Trial Court and will be discussed in the order presented by Appellant.

SUMMARY OF ARGUMENT.

The Appellant has failed to establish his case by a preponderance of the evidence. Whether Appellant has actually established a prima facie case or not, Appellee's evidence and cross-examination of Appellant has demonstrated the complete failure of proof of Appellant's case.

ARGUMENT.

I.

Appellant's arguments will be answered in the order presented. The first two errors alleged are apparently that the Court wrongly characterized this case as an exclusion case, and the attendant burden of proof. The theory of the case and the method of proof adopted by the Appellant will have to be examined to explain this characterization.

Appellant's theory is apparently the following: He established that a person named Lau Ah You was admitted to the United States at Honolulu on primary inspection by an immigrant inspector. The Appellant

contends that this establishes a prima facie case of United States nationality, citing *Delmore v. Brownell,* (3 Cir. 1956), 236 F. (2d) 598. (Cited in his brief under the name of *Delmore v. U. S.,* 136 F. (2d) 599).

Prior admission as a U. S. citizen particularly when made does not create a presumption or prima facie case in favor of the person admitted. It may be considered as evidence along with all other facts, and it is only the duty of the Court to consider the prior admission. *Wong Chow Gin v. Cahill,* 79 F. (2d) 854; *Lum Mon Sing v. U. S.,* 9 Cir., 124 F. (2d) 21; *Flynn v. Ward,* 1 Cir. 1938, 95 F. (2d) 742; *Mock Kee Song v. Cahill,* 9 Cir. 1938, 94 F. (2d) 975; *Mah Toi v. Brownell,* 9 Cir. 1955, 219 F. (2d) 642, cert. den. 350 U.S. 823, 76 S.Ct. 49; and *Louie Hoy Gay v. Dulles,* 9 Cir., Slip Opinion No. 15,390, decided September 12, 1957.

A comparison was made during the trial of the differing burdens of proof in deportation (burden on the Government), and in exclusion (burden on the person seeking admission). Since Appellant apparently does not contend that he has no burden of proof, the characterization of the case as being like an exclusion case by the Court is not erroneous in the first place. The pleadings obviously show this case to be a normal "identity" type of action instituted under Section 503, Nationality Act of 1940 (8 U.S.C. former Section 903).

Consequently, the characterization of the case as an exclusion type case merely points out that the burden is not on the Government to disprove citizenship in

the first instance. In this case, as in an exclusion case, the burden is upon the Appellant to establish his citizenship by a fair preponderance of the evidence. *Ly Shew v. Dulles*, 9 Cir. 1954, 219 F. (2d) 413; *Mah Toi v. Brownell, supra;* and *Louie Hoy Gay v. Dulles, supra.*

Appellant places great reliance on *Ah Kong v. Dulles,* (U.S. D.C. N.J., 1955), 130 F. Supp. 546. The *Ah Kong* case, if for no other reason is easily distinguished on the facts. There a U. S. Commissioner found that Ah Kong was a citizen and the Immigration Service has repeatedly made findings that Ah Kong was a citizen.

For the purposes of argument, let's concede that Appellant's theory of law is correct, that a prima facie case was set out by proof of admission on primary inspection.

The Court also found that there was no evidence worthy of belief that Appellant was the person admitted to the United States on primary inspection (R. 18). This is an indispensable element of Appellant's case under any theory of law. In order to do this the Court had to do two things. He had to find that Appellant's testimony is unreliable, and further, he had to give no weight to the testimony of his attorney. Once this is done there is no other evidence establishing identity and, consequently, a complete failure of proof of a prima facie caes.

Secondly, a prima facie case has a "minimal" amount of evidence supporting it. *Mah Toi v. Brownell, supra;* and *Louie Hoy Gay v. Dulles, supra.*

It is apparently the law of this circuit that the defendant in this type of case has no extraordinary burden of proof. *Ly Shew v. Dulles, supra; Mah Toi v. Brownell, supra;* and *Louie Hoy Gay v. Dulles, supra.* This is not the case of a person whose citizenship is being taken away in a denaturalization proceeding (*Baumgartner v. U. S.,* 332 U.S. 665), or whose citizenship is admitted except for alleged acts of expatriation. The real issue in this case is the Appellant's identity as a U. S. citizen. Appellee's evidence, together with the insubstantiality of Appellant's proof, reveals that the Trial Court committed no error. That the evidence presented did not preponderate in favor of the Appellant.

Appellant has made the statement in his brief that "The burden of proof in an exclusion proceeding is entirely upon the plaintiff-alien and his burden of proof is to show without doubt that he is a citizen of this country. *Wong Choy v. Haff,* 83 F. (2d) 963." (Br. 14). Appellant's statement that the burden of proof is to show without a doubt that he is a citizen of this country is not supported by the case. Appellee has been unable to find any authority to that effect and it is certainly not found in the case cited.

III.

Appellant's final argument is clearly a factual one. Since he is not satisfied with the Trial Court's evaluation of the evidence he wants this Court to refind the facts—this time in his favor. As far as the Trial Court is concerned Appellant must be considered to

have established the minimum amount of evidence (without regard to its weight or the credibility of witnesses), since Appellee's motion to dismiss at the close of Appellant's evidence was denied (R. 64.)

The question of Appellant's identity has been touched upon supra. However, the only testimony of actual identity of the Appellant came from his attorney (R. 90-92). This evidence the Trial Court *chose to disbelieve.* The Trial Court found there was no evidence worthy of belief on the question of identity (R. 18), not as Appellant states no evidence at all (Br. 17).

The Form I-404-a, coupled with testimony of Alice Thoene, admitted by waiver of objection (R. 101-102) shows that a person by the name of Lau Ah Yew was admitted to the United States on primary inspection and that there was no hearing before a board of Special Inquiry (R. 106-109).

The departure record was admitted in evidence on stipulation. The Court found that this departure record was the one claimed by Appellant. See Plaintiff's Exhibit 1. And that in view of Appellant's testimony the departure record did not relate to him. In other words, the basis of the prima facie case (if there be one) is being attacked. The Immigrant Inspector based the decision partly on the departure record (see Plaintiff's Exhibit 1). He also based his decision on testimony of witnesses. Appellant's claimed witnesses (on his claimed admission into United States) testified that they saw his father as late as 1913 in China. He was admitted in 1915.

Appellant also testified that his father was in China at that time (Plaintiff's Exhibit 1). There was no mention of a stepfather in 1915 at the time of his entry. Now Appellant testifies that his father died when he was very young and he had an adopted father. This is a good indication of the unreliability of witnesses who testified in Appellant's behalf in 1915. This also weakens any prima facie case which Appellant may have had. Appellant makes the following statement at page 22 of his brief, "Appellant's adopted father was alive at that time and one witness had knowledge of two fathers, one dead and one alive (Tr. 40, L. 19-20)."

Appellee has searched the record to find where the witness himself showed any knowledge of Appellant having two fathers other than Appellant's self-serving statement. It certainly does not show up in the 1915 hearing (Plaintiff's Exhibit 1).

The Appellant's testimony is unreliable. It is not only unreliable about things which are alleged to have happened many years ago, but about things of more recent date. It is undoubtedly because of this unreliability that the Trial Court chose to disregard his testimony.

Appellant stresses the Certificate of Identity introduced by Appellant. The weight to be given a Certificate of Identity is aptly described by this Court in *Louie Hoy Gay v. Dulles, supra,* at page 11. The Certificate has no bearing whatsoever on whether the man himself is a citizen, particularly so when there is no believable evidence that Appellant is the person

to whom the Certificate relates. The Certificate came from the Immigration file of Lau Ah Yew (R. 7).

In addition, Appellant failing to get United States identity and travel documents secured a Chinese Passport from the Consulate in Honolulu (R. 87, 88). Further, the passport states his Native District as Chungshan, China (R. 59).

CONCLUSION.

The Court did not err in its findings. Appellant's testimony is completely unreliable from start to finish. If a prima facie case was established then it has been overcome by evidence in the record. The Court did not err in finding the burden of proof to be on the Plaintiff-Appellant, or in disregarding the *Delmore* case which apparently stands alone.

Dated, Honolulu, T.H.,
January 14, 1958.

Respectfully submitted,

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